

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES EDWARD KITCHEN,

Defendant-Appellant.

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UNPUBLISHED

March 13, 2007

No. 267045

Cheboygan Circuit Court

LC No. 05-003206-FC

Before: Servitto, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of four counts of criminal sexual conduct in the first degree, the victim being under 13 years of age, MCL 750.520b(1)(a), entered after a jury trial. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to concurrent terms of 27 to 50 years in prison, with credit for 366 days. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Complainant (DOB 6-9-93), defendant's former stepdaughter, alleged that between 2000 and 2003, defendant forced her to engage in fellatio with him, and engaged in digital penetration and sexual intercourse with her. A physician who examined complainant opined that complainant had been sexually abused, basing her opinion on both the physical examination and the history she obtained from complainant. Defendant testified that he never engaged in any type of sexual activity with complainant. Defendant also asserted that when complainant's mother confronted him about the allegations, complainant was present and was laughing.

During closing argument, the prosecutor indicated that complainant testified regarding the allegations, and that other persons who had spoken with complainant about the allegations testified consistently that complainant was distraught and had a very difficult time relating the events. The prosecutor asserted that complainant had no motive to lie about defendant's actions. Subsequently, in rebuttal argument, the prosecutor asserted that defendant's denials were not reasonable in light of the other evidence, and characterized defendant as a "liar" and a "pervert".

Defendant argues that the prosecutor denied him a fair trial by using incendiary language to engender sympathy for complainant, and asserts that the prosecutor's use of terms such as "liar" and "pervert" to describe him improperly bolstered complainant's testimony and implied special knowledge on the part of the prosecutor. We disagree.

A claim of prosecutorial misconduct is generally reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). Where, as here, there is no objection to the prosecutor's statements/actions, review is for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis. The reviewing court must examine the pertinent portion of the record, and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Jansson*, 116 Mich App 674, 693; 323 NW2d 508 (1982). A prosecutor may not vouch for the credibility of a witness to the effect that he has special knowledge that a witness testified truthfully, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), but may argue from the facts that a witness is worthy of belief. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Moreover, no error requiring reversal will be found if the prejudicial effect of the prosecutor's remarks could have been cured by a timely instruction. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

In the instant matter, the prosecutor argued that complainant's testimony was worthy of belief because complainant had no motive to make such serious allegations or to put herself through the trauma of a trial. The prosecutor also noted that other witnesses who spoke with complainant testified consistently that complainant was emotionally distraught and had great difficulty talking about the allegations. The prosecution did not improperly argue that the jury should base its verdict on sympathy. *Watson*, *supra* at 591. The prosecutor's argument, viewed in the context of a case in which physical evidence did not exist, was not improper. *Noble*, *supra*.

The prosecutor's use of the strong terms "liar" and "pervert" to describe defendant came in rebuttal argument in response to defendant's argument that complainant fabricated her allegations. Prosecutorial arguments must be evaluated in light of defense arguments. *Schutte*, *supra*. Keeping in mind that a prosecutor need not use the least prejudicial evidence available to establish a fact, and need not state inferences in the blandest possible terms, *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001), we conclude that any prejudice resulting from the prosecutor's use of these terms was not so great that it could not have been cured by a timely instruction. *Leshaj*, *supra*. No plain error occurred. *Carines*, *supra*.

Affirmed.

/s/ Deborah A. Servitto

/s/ Michael J. Talbot

/s/ Bill Schuette